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JEFFERSON CITY  
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SECRETARY OF STATE

SECURITIES DIVISION  
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May 22, 2003

**VIA FACSIMILE AND U.S. MAIL**

Mr. George R. Walls  
Assistant General Counsel  
Bank of America  
Legal Department  
NC1-002-29-01  
101 South Tryon Street  
Charlotte, NC 28255

Re: Bond Elections – Section 409.107, RSMo 2000;  
Interpretive Opinion – File No. 2003-00438; IO-07-03

Dear Mr. Walls:

You have requested that the commissioner of securities provide an interpretive opinion as to whether Bank of America, National Association or its affiliate, Banc of America Securities LLC, would violate §409.107, RSMo 2000, if Bank of America, National Association were to engage in certain political activities resulting in funds being provided to a campaign in support of a bond election and if Banc of America Securities LLC were to be involved in the issuance of such bonds. The following interpretive opinion of the commissioner of securities is authorized by §409.414(e), RSMo 2000 and issued with the approval of Secretary of State Matt Blunt.

**Facts**

You made the following representations, among others, in your correspondence:

1. Bank of America, National Association (“BOA-Bank”) has for some time supported a St. Louis based civic organization, Civic Progress, Inc.
2. Civic Progress has a lobbyist arm known as Civic Progress Action Committee (“Civic Progress-PAC”), which in addition to conducting lobbyist activities may periodically support issue related campaigns.
3. At the same time, Banc of America Securities LLC (“BOA-Securities”) has engaged in the underwriting of bonds in the State of Missouri.

4. BOA-Securities is an indirect subsidiary of Bank of America Corporation.
5. BOA-Securities is a sister corporation to BOA-Bank, however BOA-Securities is not owned or controlled by BOA-Bank.
6. Additionally, BOA-Bank has formed Bank of America Missouri Political Action Committee ("BOA-PAC").
7. BOA-PAC is funded by contributions from officers of BOA-Bank, which may make contributions to Civic Progress-PAC.
8. No contributions from officers of BOA-Securities are made to the BOA-PAC.

### **Issue**

You have requested that the commissioner of securities confirm whether contributions made by BOA-PAC to Civic Progress-PAC, which then contributed funds to a campaign in support of a bond election, would result in a violation of §409.107 if BOA-Securities were involved in the issuance of such bonds.

### **Analysis**

Section 409.107, RSMo 2000 states:

"No investment firm, legal firm offering bond counsel services, or any persons having an interest in any such firms shall be involved in any manner in the issuance of bonds authorized by an election in which the firm or person made any contribution of any kind whatsoever to any campaign in support of the bond election."

Section 409.107 became law in August 1992. A staff member with the Missouri Legislative Research Division, informed the Securities Division that no legislative history was available for this statute.<sup>1</sup> Section 409.107 was enacted in Missouri shortly before the Municipal Securities Rulemaking Board ("MSRB") Rule G-37<sup>2</sup> was adopted by the U.S.

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<sup>1</sup> In supplemental information provided to the Securities Division from an opinion of a Missouri attorney, his research presented that §409.107 was included in Senate Bill No. 705 in 1992 due to concerns of one or more legislators that firms providing financial advisory or bond counsel services to a school district were directly paying for advertisements promoting one or more propositions for which they would be paid fees if the ballot measures were approved.

<sup>2</sup> Rule G-37 states in part:

"(b) no broker, dealer or municipal securities dealer shall engage in municipal securities business with an issuer within two years after any contribution to an official of such issuer made by: (i) the broker, dealer or municipal securities dealer; (ii) any municipal finance professional associated with such broker, dealer or municipal securities dealer; or (iii) any political action committee controlled by the broker, dealer or municipal securities dealer or by any municipal finance professional . . .

(c) No broker, dealer or municipal securities dealer or any municipal finance professional of the broker, dealer or municipal securities dealer shall solicit any person or political action committee to make any contribution, or

Securities and Exchange Commission (the "SEC") in 1994. The adoption of Rule G-37 was the result of concerns nationally concerning political contributions to state and local officials and the contributions influencing the selection of the underwriter. These practices became known as "pay to play" and were thought to be undermining the integrity of the municipal securities markets.

Rule G-37 is similar to §409.107. Rule G-37, in general, prohibits brokers, dealers and municipal securities dealers from engaging in municipal securities business with issuers if certain political contributions have been made to officials of such issuers. Both Rule G-37 and §409.107 prohibit a broker-dealer from engaging in the issuance of bonds in connection with a related political contribution by such broker-dealer. The main difference between Rule G-37 and §409.107 is that Rule G-37 refers to contributions to officials of an issuer while §409.107 refers to contributions to a campaign in support of a bond election. However, the purpose of both Rule G-37 and §409.107 is the same, to protect the public and other underwriters of municipal bonds against unfair, corrupt market practices.

A. The Firm and Persons Included under §409.107

In interpreting §409.107, the first part of the analysis is to determine which persons or firms that contribute to a campaign in support of a bond election would result in the prohibition from involvement in the issuance of such bonds. The last part of §409.107 states "in which the firm or person made any contribution . . . to any campaign." In determining the firm or persons that could make a contribution and cause the prohibition, reference must be made to the first part of §409.107 that states "investment firm, legal firm . . . or any person having an interest in any such firms." Therefore, a determination needs to be made as to which persons are included under §409.107 in regard to the investment firm and any person having an interest in such investment firm.<sup>3</sup>

Rule G-37 generally limits the scope of persons, who could make a contribution to an official of such issuer and prohibit the firm from engaging in municipal securities business, to the broker, dealer or municipal securities dealer or to municipal finance professionals.<sup>4</sup> The Commissioner of Securities is of the opinion that the term investment firm under §409.107 does not include all associated persons of the investment firm, as similar to

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shall coordinate any contributions, to an official of an issuer with which the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business.

(d) No broker, dealer or municipal securities dealer or any municipal finance professional shall, directly or indirectly, through or by any other person or means, do any act which would result in a violation of sections (b) or (c) of this rule . . ."

<sup>3</sup> The Commissioner of Securities intends to propose a rule for public comment that will include an explanation of the meaning of "investment firm, legal firm offering bond counsel services, or any persons having an interest in any such firms" under §409.107. The Commissioner of Securities, is not including in this interpretation the meaning of those persons associated with a legal firm or that have an interest in such legal firm. However, an analysis under §409.107 of those persons associated with a legal firm or persons having an interest in such legal firm would be similar to the analysis presented in this interpretive opinion.

<sup>4</sup> See Rule G-37(b) and (c) supra note 2.

G-37(g)(iii).<sup>5</sup> The term investment firm would include acts by persons on behalf or in the interest of the investment firm. The phrase “any person having an interest in any such firms” would include control persons as defined under Missouri regulation 15 CSR 30-50.010(1)(H)<sup>6</sup> and those associated persons with the investment firm that are municipal finance principals as defined under Rule G-37(g)(iv).<sup>7</sup>

In applying the above interpretation to the facts presented in your correspondence, the contribution made by the officers of BOA-Bank to the BOA-PAC would not be contributions by an investment firm or persons having an interest in such firm to the BOA-PAC or to the Civic Progress-PAC. The contributions by officers of BOA-Bank would not be construed as contributions by BOA-Securities. Further, contributions by officers of BOA-Bank to the BOA-PAC would not be construed as contributions by control persons or municipal financial principals of BOA-Securities. However, this conclusion is based on your representation that none of the officers of BOA-Securities contributed to the BOA-PAC and the assumption that BOA-Securities did not make a contribution to the BOA-PAC. You would want to further consider the analysis in this interpretive opinion to all the facts and determine whether BOA-Securities or any control persons or any municipal finance professionals of BOA-Securities contributed to the BOA-PAC or to the Civic Progress-PAC.

B. Contribution Interpreted under §409.107

Another part of the issue would be to determine whether any control persons or municipal finance professionals of BOA-Securities would make any contribution to any campaign in support of a bond election.

The term contribution must be interpreted under §409.107 to determine whether any contribution is made to a campaign in support of a bond election. The Commissioner is of the opinion that the meaning of “contribution” under §409.107 is similar to the meaning of that term as defined under Rule G-37(g)(i).<sup>8</sup> Again, the purpose and structure of §409.107

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<sup>5</sup> Rule G-37(g)(iii) “The term ‘broker, dealer or municipal securities dealer’ used in this rule does not include associated persons.”

<sup>6</sup> MO 15 CSR 30-50.010(1)(H) “Control and controlling person mean possession of the power, authority or means to engage in the management or policymaking functions of a person, directly or indirectly, through ownership of securities, by contract or otherwise. An officer, director, partner or trustee or individual occupying similar status or similar functions or a person owning ten percent (10%) or more of the outstanding shares of any class or classes of securities of another shall be presumed a controlling person . . .”

<sup>7</sup> Rule G-37(g)(iv) “The term ‘municipal finance professional’ means: (A) any associated person primarily engaged in municipal securities representative activities . . . (B) any associated person who solicits municipal securities business . . . (C) any associated person who is both (i) a municipal securities principal or a municipal securities sales principal and (ii) a supervisor of any persons described in subparagraphs (A) or (B); (D) any associated person who is a supervisor of any person described in subparagraph (C) up through and including, in the case of a broker, dealer or municipal securities dealer other than a bank dealer, the Chief Executive Officer or similarly situated official, and, in the case of a bank dealer, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank’s municipal securities dealer activities . . . or (E) any associated person who is a member of the broker, dealer or municipal securities dealer . . . executive or management committee or similarly situated officials . . .”

<sup>8</sup> Rule G-37(g)(i) “The term ‘contribution’ means any gift, subscription, loan, advance, or deposit of money or anything of value made: (A) for the purpose of influencing any election for federal, state or local office; (B) for

and Rule G-37 are nearly identical. Also, the definition of contribution under G-37 is similar to the definition of contribution under Missouri's Campaign Finance Disclosure Law, §130.011(12), RSMo 2000.<sup>9</sup>

The Commissioner of Securities, therefore is of the opinion that contribution under §409.107 means any gift, subscription, loan, advance or deposit of money or anything of value made: (1) for the purpose of influencing any election for the support of a bond measure; or (2) for payment of debt incurred in connection with any such election.<sup>10</sup> This definition of contribution does not include personal volunteer work by control persons or municipal finance professionals in campaigns in support of a bond election. This exclusion of volunteer work from the definition of contribution is similar to interpretations of Rule G-37<sup>11</sup> and §130.011(12)(i)9(a).<sup>12</sup> Thus, control persons or municipal finance professionals will not be restricted under §409.107 from engaging in personal volunteer work for a campaign in support of a bond election. This interpretation of contribution under §409.107 narrowly tailors the statute to achieve its goal without unnecessary abridgement of First Amendment rights. Please see Blount v. Securities and Exchange Commission, 61 F.3d 938, 947 (citing Buckley v. Valeo, 424 U.S. at 25).

However, the use of an investment firm's resources or expenses incurred by control persons or municipal finance professionals in personal volunteer work for a campaign in support of a bond election may be considered a contribution to such campaign under §409.107. The use of a firm's resources or incurring expenses for a campaign in support of a bond election is giving something of value to the campaign and would be a contribution under §409.107. This interpretation is consistent with the MSRB's interpretation of contribution under Rule G-37.<sup>13</sup> Note, that services contracted and paid for at fair value in

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payment of debt incurred in connection with any such election or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office."

<sup>9</sup> Section 130.011(12) defines contribution, in part, as "a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting . . . the qualification, passage or defeat of any ballot measure."

<sup>10</sup> The Commissioner of Securities intends to propose a rule for public comment interpreting §409.107 and the proposed rule will include this definition of contribution.

<sup>11</sup> SEC Release No. 33868 on page 5 states that Rule G-37 "will not restrict personal volunteer work by municipal finance professionals in political campaigns other than soliciting or coordinating contributions." MSRB Questions & Answers Notice: Rule G-37, number 24 (May 24, 1994) states that, "Rule G-37 is not intended to prohibit or restrict municipal finance professionals from engaging in personal volunteer work."

<sup>12</sup> Section 130.011(12)(i)9(a) states that a contribution does not include "services provided by individuals volunteering their time in support of . . . a committee or ballot measure."

<sup>13</sup> MSRB Questions & Answers Notice: Rule G-37, number 24 (May 24, 1994) states, in part, that, ". . . if the municipal finance professional uses the dealer's resources (e.g., a political position paper prepared by dealer personnel) or incurs expenses in the conduct of such volunteer work (e.g., hosting a reception), then the value of such resources or expenses would constitute a contribution. Personal expenses incurred by the municipal finance professional in the conduct of such volunteer work, which expenses are purely incidental to such work and unreimbursed by the dealer (e.g., cab fares and persona meals), would not be constitute a contribution." MSRB Questions & Answers Notice: Rule G-37, number 3 (August 18, 1994) states, in part, that, "An employee of a dealer generally can donate his or her time to . . . [a] campaign without this being viewed as a contribution by the dealer . . . as long as the employee is volunteering his or her time during non-work hours, or

connection with a campaign in support of a bond election are probably not contributions under §409.107.<sup>14</sup>

Another issue that must be addressed in this request for an opinion is the question of whether contributions made by an investment firm or municipal finance professionals to a political action committee ("PAC") in which the PAC makes a contribution to a campaign in support of a bond election would thus prohibit such investment firm or municipal finance professionals from being involved in the issuance of such bonds. The Commissioner is of the opinion that an indirect contribution would be a violation of §409.107 if such contribution would be a violation if made directly. This interpretation would be similar to Rule G-37.<sup>15</sup> For instance, under §409.107, an investment firm would violate §409.107 if such firm were involved in the issuance of bonds after providing money to a PAC, person or entity when individuals for the investment firm knew that the money would then be given to the campaign in support of a bond election. This money or contribution given to a PAC, entity or person could not be given directly to the campaign without violating the prohibition on involvement in the issuance of such bonds under §409.107.

Another area of concern to the Commissioner involves PACs that are either controlled by an investment firm or where a person having an interest in such firm has the ability to direct or cause the direction of the management or the policies of the PAC. A contribution to a campaign in support of a bond election made by a PAC that is controlled by an investment firm would thus, under §409.107, prohibit the investment firm from involvement in the issuance of such bonds. Likewise, a contribution by a PAC to a campaign in support of a bond election in which a person having an interest in such investment firm directs or causes the direction of the management of the PAC to contribute to a campaign would also prohibit the investment firm from involvement in the issuance of such bonds under §409.107. This interpretation is similar to the MSRB's interpretation of Rule G-37.<sup>16</sup>

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is using previously accrued vacation time or the dealer is not otherwise paying the employee's salary (e.g. an unpaid leave of absence)."

<sup>14</sup> On August 15, 2002, the Attorney General's Office provided legal advice to the Secretary of State and the Securities Division staff regarding interpretation of §409.107 in which the Attorney General's Office stated, among other things, that "services for which a school district contracts and pays, assuming payment is fair value, are not contributions with the meaning of the statute [§409.107]. There may, however, be a problem if payment is contingent on a particular outcome." The Attorney General's Office further advised that "the statutory prohibition [in §409.107] is intended only to apply to efforts made after a decision has been made to take the matter to the voters." The Commissioner of Securities is persuaded by this position. The term campaign under §409.107 is interpreted to mean that there has been an official decision to have an election for the bonds.

<sup>15</sup> MSRB Questions & Answers Notice: Rule G-37, number 1 (August 6, 1996) states, in part, that, "Rule G-37(d) prohibits a dealer and any municipal finance professional from doing any act indirectly which would result in a violation of the rule if done directly by the dealer or municipal finance professional . . ."

<sup>16</sup> MSRB Questions & Answers Notice: Rule G-37, number 6 (May 24, 1994) states, in part, that, "Each dealer must determine whether a PAC is dealer controlled. For dealers, other than bank dealers, one may assume that any PAC of the dealer would be considered a dealer-controlled PAC for purposes of rule G-37. For bank dealers, it will depend upon whether the dealer or anyone from the dealer department has the ability to direct or cause the direction of the management or the policies of the PAC."

Further, any funds provided by the investment firm or persons having an interest in such firm to a non-affiliated PAC could be construed as contributions under §409.107. Persons on behalf of the investment firm or persons having an interest in such firm should inquire as to how any funds received by the non-affiliated PAC would be used. If individuals for the investment firm are aware that funds received by the non-affiliated PAC would be given to a campaign in support of a bond election, then any funds provided by the investment firm or persons having an interest in such firm would be construed as contributions by the investment firm or persons having an interest in such firm to a campaign in support of a bond election under §409.107.<sup>17</sup>

However, if an investment firm or persons having an interest in such firm contribute to a non-affiliated PAC supporting multiple causes, and such persons are unaware that the funds contributed to the PAC would later be provided to a campaign in support of a bond election, then the investment firm would not violate §409.107 if the investment firm were involved with the issuance of the bonds authorized by the election. This analysis is based on the facts that neither the investment firm nor persons having an interest in such firm directed or influenced such decision by the PAC to provide funds to the campaign in support of the bond election.

### **Conclusion**

Based on the facts, as presented in your correspondence, we are of the opinion that contributions by the BOA-PAC to the Civic Progress-PAC would not result in a violation of §409.107 by BOA-Securities if such contributions were given by Civic Progress-PAC to a campaign in support of a bond election and where BOA-Securities was involved with the issuance of such bonds. Note that this opinion does not constitute an exclusion from the anti-fraud provisions of the Missouri Securities Act. This opinion is based on the facts presented in your correspondence, and should the facts prove to differ from those presented, the opinion of this office may differ.

Sincerely,

MATT BLUNT  
Secretary of State

Douglas M. Ommen  
Commissioner of Securities

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<sup>17</sup> This interpretation of §409.107 is similar to the MSRB's interpretation of Rule G-37. MSRB Questions and Answers Notice: Rule G-37, number 2 (August 6, 1996) states, in part, that, "Dealers should inquire of the non-dealer associated PAC or political party how any funds received from the dealer would be used. For example, if the non-dealer associated PAC or payments to the political party is soliciting funds for the purpose of supporting a limited number of issuer officials, then, depending upon the facts and circumstances, contributions to the PAC or payments to the political party might well result in the same prohibition on municipal securities business as would a contribution made directly to the issuer."